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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85267214
Applicant	Kurek, Arthur M
Applied for Mark	DON'T CARE SPORTS WEAR
Correspondence Address	RICHARD D. KRAUS, ESQ. 1 UNIVERSITY PLZ STE 14 HACKENSACK, NJ 07601-6207 UNITED STATES rdkraus@earthlink.net
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Filer's Name	RICHARD D. KRAUS, ESQ.
Filer's e-mail	rdkraus@earthlink.net
Signature	/Richard D. Kraus, Esq./
Date	11/07/2011

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Serial No. 85267214

Mark: DON'T CARE SPORTS WEAR

Applicant: Arthur M. Kurek

Examining Attorney: Hannah M. Fisher, Esq.
Law Office 111

Applicant's Attorney: Richard D. Kraus, Esq.
One University Plaza, Suite 14
Hackensack, New Jersey 07601
(201) 487-2870
(201) 343-8517 (fax)

EX PARTE APPEAL

APPLICANT'S BRIEF

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COMES NOW the Applicant, Arthur M. Kurek, by Counsel, and hereby respectfully appeals the Examining Attorney's refusal to register the mark DON'T CARE SPORTS WEAR in standard characters.

DESCRIPTION OF RECORD

A. Prosecution History

The Application to register DON'T CARE SPORTS WEAR was initially refused on June 21, 2011 in a non-final office action. The Applicant filed a Response to the Office Action on August 18, 2011, including a disclaimer as to the exclusive right to use "sportswear" apart from the mark as shown. A Final Refusal of Registration for the mark DON'T CARE SPORTS WEAR was issued by the Examining Attorney on September 11, 2011 based upon the Examining Attorney's conclusion that the proposed mark created a likelihood of confusion with the previously registered mark IDC I DON'T CARE WEAR. The Applicant's Notice of Appeal was timely filed on September 27, 2011.

B. Examining Attorney's Evidence

June 21, 2011 Office Action

The Office Action has five attachments annexed:

Exhibit 1 The abstract for the previously registered mark, Serial No. 77599795, IDC I DON'T CARE WEAR.

Exhibit 2 The Specimen for IDC I DON'T CARE WEAR.

Exhibit 3 MacMillan Dictionary definition for

"sportswear."

Exhibit 4 Merriam Webster Dictionary definition for
"sportswear."

Exhibit 5 YourDictionary.com Dictionary definition for
"sportswear."

September 11, 2011 Final Action

The Final Action has no attachments.

C. Applicant's Evidence

August 18, 2011 Response to Office Action

Exhibit A Google search performed on August 11, 2011
reflecting no results for IDC I DON'T CARE
WEAR.

Exhibit B Yahoo search performed on August 11, 2011
reflecting one result for IDC I DON'T CARE
WEAR. That result referred the searcher to the
page for the attorney who represented the
Applicant who registered that mark.

Exhibit C Dogpile search performed on August 11, 2011
reflecting two results for IDC I DON'T CARE
WEAR. Those results referred to (1) the page
for the attorney who represented the Applicant
who registered that mark; and (2) a totally
unrelated sponsored advertisement.

ARGUMENT

A. Applicant's Direct Argument

Preliminary

The initial Office Action issued on June 21, 2011 indicated that the Applicant's application for registration was:

"refused because of a likelihood of confusion with the mark in U.S. Registration No. 3,630,810. Applicant's mark and the cited registration both include the wording "DON'T CARE ...WEAR" for clothing." [the Final Action affirmed same].

The full Word Mark for U.S. Registration No. 3,630,810 is "IDC I DON'T CARE WEAR." That Registration is held by Gino Polumbo (hereinafter "Polumbo"). For the reasons set forth below, the Applicant respectfully submits that it is not in fact probable that his mark will be confused with Polumbo's mark.

Legal Standard

The standard to be used in deciding whether registration should be permitted is whether there is a likelihood of confusion between Polumbo and Applicant's marks and products; and a likelihood of confusion exists when a typical consumer viewing the mark would probably assume that the Applicant's product is associated with the Polumbo product. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1361-62 (C.C.P.A. 1973); A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198, 206, 211 (3rd Cir. 2000).

Our Courts have established a set of recommended "factors" to be considered, where appropriate, for such evaluation, the most important, particularly where goods are of the same class, being the degree of similarity between the marks. The analysis is to be a qualitative one, rather than quantitative (it is not the number of applicable factors that count, but the weight of those which apply). In re E.I. du Pont de Nemours & Co., Id at 1361-62; A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., Id at 211-17.

Similarity

The test for whether marks are confusingly similar is "whether the labels create the same overall impression when viewed separately," i.e. when ordinary consumers would likely conclude that the two products share a common source, affiliation, connection or sponsorship. A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., Id at 216.

To determine "similarity," our Courts compare the marks appearance, sound and meaning. A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., Id at 217. It is respectfully submitted that the marks significantly differ in both appearance and sound.

Here is how the marks look:

Polumbo	IDC I DON'T CARE WEAR
Applicant	DON'T CARE SPORTS WEAR

Although, as noted by the examining attorney, both marks contain the words Don't, Care and Wear, the Polumbo mark begins with three letters that do not spell an actual word, and are, in fact, an abbreviation of the last three words of the mark; this makes for a very different impression on the viewer than the Applicant's mark, which contains no abbreviations. A customer looking for IDC..... is not going to be confused by any mark that does not begin with IDC; that is the most distinctive part of Polumbo's mark and sets it off from all others which do not begin with IDC.

Equally important, the Applicant's mark contains the word Sports, which does not appear in the Polumbo mark, and which gives the mark a different look and connotation. Customers shopping for IDC I Don't Care Wear will be brought up short by the presence of the word Sports. For them, that should not be there.

Next we look at, or listen to, the sound of the marks. At seven syllables, Polumbo's mark is almost twice as long as the Applicant's (four syllables). In addition, they each have distinctive sounds and flows when spoken out loud. Try it yourself. Polumbo's mark begins with three letters which do not make up a word and which give the entire mark a very choppy and aggressive sound. By contrast, Don't Care Sports Wear is very smooth and soothing. It is submitted that the marks sound so different when spoken out loud that they can not be confused by any customer looking for one or the other.

Finally, although a lesser distinction, it is noted that the addition of the word Sports to the Applicant's mark gives it a slightly different and more nuanced connotation than that of Polumbo's.

Strength or Fame

A second factor often considered by the Courts is the strength or fame of the mark, i.e. commercial strength or marketplace recognition of the mark. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1361 (C.C.P.A. 1973); A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198, 211, 221 (3rd Cir. 2000).

In our modern marketplace, one of the best indicators of market strength and fame is the internet. Searches conducted on August 11, 2011 utilizing Google, Yahoo and Dogpile search engines did not find a single hit for the mark or product itself (the search did reflect the actual filing of the trademark and the attorney who handled its registration). See Exhibits A, B and C previously filed with our Response to the initial Office Action.

Based on these searches, it is clear that IDC I Don't Care Wear has little or no market strength whatsoever.

Care and Attention Expected of Consumers

A third factor to be considered is the care and attention expected of consumers when making a purchase. A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198, 215, 225 (3rd Cir. 2000). The A&H Court characterized this as the "sophistication of

consumers." *Id.* at 225.

Simply put, consumers who are shopping for a brand name apparel good are, by definition, sophisticated. Even many shoppers who would not be considered sophisticated in other ways, in the context of shopping for brand name clothing, will be.

Any consumer, to whom it is important to buy IDC DON'T CARE WEAR, is going to immediately notice if a tag or label says DON'T CARE SPORTS WEAR. A man or women looking for Fruit of the Loom is not going to confuse it with FOCL Fruit of the Clothes Loom.

Brand names are important to consumers, particularly in the clothing section of the store. Men and women who are sophisticated [or picky] enough to be looking for a particular brand will not buy one that has abbreviations [or omits abbreviations], or has [or omits] additional words, if that is not what they were looking for.

Marketing Channels and Advertising Media

Finally, a fourth factor to be considered is whether the goods are, or will be, marketed through the same channels of trade and/or advertised through the same media. *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 215 (3rd Cir. 2000).

The Applicant intends to rely heavily on internet marketing and placement and, in fact, has secured "Don't Care Sports Wear" as a domain name/address to use in the future. Polumbo claims he first used his mark in commerce in 1998 and registered it in 2009. However, despite such alleged use, he has no internet presence at

all. See above and Exhibits A, B and C to Applicant's Response to Office action.

Summary

For all of the above reasons, it is respectfully submitted that there is minimal likelihood that the marks, and their respective products, would be confused, falling far short of the "probable" standard. That being the case, the registration should be allowed.

B. Applicant's Responses to Examining Attorney's Final Action

1. Identical and/or rhyming words or terms.

The Examining Attorney emphasizes that, "The marks both contain the wording 'don't care ... wear' for [sic?]. Both included the same rhyming terms 'care' and 'wear'." (Page 2 of Final Action). We respectfully submit that this mistakenly overemphasizes a part of each mark, at the expense of considering the marks in their entirety.

The Court of Appeals for the Federal Circuit has provided the following guidance with regard to determining and articulating likelihood of confusion:

The basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used (citations omitted). **It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark** (footnote omitted). On the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or

less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties (footnote omitted). Indeed, this type of analysis appears to be unavoidable. [emphasis added].

In re National Data Corp., 753 F.2d 1056, 1058, 224 USPQ 749, 750-51 (Fed. Cir. 1985). TMEP §1207.01.

Here, the Examining Attorney was improperly swayed by those parts of the marks that were similar. She ignored the all important and distinguishing first word of the Polumbo mark: IDC. Both the appearance and (in particular) the sound of that initial "word" [really an abbreviation that can only be pronounced by saying each letter out loud] substantially distinguish it from the Applicant's mark.

By considering only, or primarily, the similar aspects of the marks, the Examining Attorney excludes those aspects which differentiate them. As argued above, the sound and appearance of "IDC" attached to the front of Polumbo's mark clearly separates it from the Applicant's.

A clothing shopper looking for the brand IDC I Don't Care Wear will be brought up short by the absence of "IDC." Therefore, the presence of some identical or rhyming words or phrases after that initial "word," will not be enough, when the marks are taken as a whole, to confuse a customer into thinking that the Applicant's goods are associated with Polumbo. It is certainly not probable that the customer would be so confused.

The case law in fact reveals the registration or conformation of similar or identical marks. For example, in Safer, Inc. v. OMS Investments, Inc., Serial No. 78898038 (TTAB June 1, 2006), the Board dismissed opposition to registration of the mark DEER-B-GON, which was objected to by the holder of the mark DEER AWAY, both marks to be utilized for products repelling deer, other big game and rabbits [legally identical goods]. There, the Board specifically pointed out that similarity of the marks in one respect does not automatically mean that the marks will be found to cause confusion. Id at 36, citing In re Lamson Oil Co., 6 USPQ2d at 1042 n. 4.

In Safer the Board found that, in comparing the marks, overall they were not similar in appearance or sound because B-GON and AWAY look and sound different. Id at 37. Here, the presence of the abbreviation IDC at the beginning of Polumbo's mark make the appearance and sound different. The presence of the word SPORTS in the Applicant's mark adds an additional dissimilar aspect.

Similarly, Pacific Sunwear of California, Inc. v. AIT, Inc., Serial No. 75323781 (TTAB February 18, 2004), while not citable as precedent, is instructive. There, the Board dismissed opposition to registration of the mark PAC AIT, which was objected to by the holder of the mark PAC SUN.

The Board first found that clothing items were related to retail clothing store services for the same items. Id at 12. It then noted that the marks had the word PAC in common, i.e. 50% of

each mark was identical. *Id* at 13.

It next found that, despite having that word in common, there were significant differences in the pronunciation and appearance of the marks (just as there are here), also noting, significantly, that the word PAC is hardly unique (just as the words in common here are hardly - actually, not at all - unique). *Id* at 14.

The Pacific Sunwear Board concluded by indicating that the term AIT (from PAC AIT) is hardly a term that would be glossed over by prospective purchasers, and that it would likely cause purchasers to pause and consider its meaning and pronunciation. *Id* at 16. Similarly here, the presence or absence of IDC would not be glossed over, or would be missed, by prospective purchasers. Concluding, the Board rejected the argument that purchasers of PAC SUN and/or PAC AIT goods [the same goods as here] were unsophisticated and would be confused by the SUN AIT mark. *Id* at 19.

Finally, we note that there are numerous (at least seven) registered marks, other than the Polumbo mark, which cover similar or identical goods, and include variations of the words "don't" "care" and "wear". This includes a Spanish version of I DON'T CARE (YO NO CARE) which, when translated, is much closer to Polumbo's mark than is the Applicant's. See Exhibit A hereto.

2. Consumer Sophistication.

The Examining Attorney argues that, "The fact that purchasers are sophisticated or knowledgeable in a particular field does not

necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion," citing *TMEP §1207.01(d)(vii)* [additional citations omitted}. Of course, whether consumers are knowledgeable in the field of trademarks is of no import whatsoever. The issue is whether it is probable that a consumer would confuse the Applicant's goods for Polumbo's, or associate the Applicant's goods with the Polumbo brand.

We note that the Examining Attorney omitted the following sentence of *TMEP §1207.01(d)(vii)*, to wit: "However, circumstances suggesting care in purchasing may tend to minimize likelihood of confusion." As indicated above (Page 7), consumers who are shopping for a brand name apparel good are, by definition, sophisticated. If, in fact, they are looking for Polumbo's goods, they will not buy a product that does not have IDC on the label. While they are not "immune" from source confusion, it is also not probable that they would confuse DON'T CARE SPORTS WEAR with IDC I DON'T CARE WEAR.

CONCLUSION

For all of the foregoing reasons, the refusal to register the Applicant's mark should be reversed.

Dated this 7th day of November, 2011.

Respectfully submitted,

/s/ Richard D. Kraus, Esq.
RICHARD D. KRAUS, ESQ.
One University Plaza, Suite 14
Hackensack, New Jersey 07601
(201) 487-2870
(201) 343-8517 (fax)
Attorney for Applicant



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YO NO CARE

Word Mark	YO NO CARE
Translations	The foreign wording in the mark translates into English as "I DON'T CARE".
Goods and Services	IC 042. US 100 101. G & S: Designs for others in the field of clothing. FIRST USE: 20080509. FIRST USE IN COMMERCE: 20080509
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	77495796
Filing Date	June 10, 2008
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	January 20, 2009
Registration Number	3601507
Registration Date	April 7, 2009
Owner	(REGISTRANT) Greene, Susan W. INDIVIDUAL UNITED STATES P.O. Box 52 Rutherford CALIFORNIA 94573
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE



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Care What You Wear

Word Mark	CARE WHAT YOU WEAR
Goods and Services	IC 025. US 022 039. G & S: Men's, Ladies' and Children's clothing, namely t-shirts, knit tops, shorts and pants; sweatshirts and sweatpants; woven shirts and pants; infant and toddler layettes and sets; robes and gowns; sleepwear; lingerie; caps and hats; shoes; socks; stockings; and slippers. FIRST USE: 20030801. FIRST USE IN COMMERCE: 20030801
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	78914590
Filing Date	June 22, 2006
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	January 30, 2007
Registration Number	3229915
Registration Date	April 17, 2007

Owner (REGISTRANT) The Apparel Source, Inc. CORPORATION WASHINGTON 2030 SW 34th Street
Renton WASHINGTON 98055

(LAST LISTED OWNER) GREENSOURCE BRAND APPAREL, INC. DBA GREENSOURCE
CORPORATION WASHINGTON 1020 SW 34TH ST RENTO WASHINGTON 98055

**Assignment
Recorded** ASSIGNMENT RECORDED

**Attorney of
Record** Erin M. Karp

Type of Mark TRADEMARK

Register PRINCIPAL

**Live/Dead
Indicator** LIVE

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DAILY WEAR EASY CARE

Word Mark DAILY WEAR EASY CARE

Goods and Services IC 025. US 022 039. G & S: Clothing for men, women, boys and girls, namely school, career, casual and custom apparel comprised of shirts and blouses, outerwear, namely overshirts, turtlenecks, sweaters, vests and jackets; pants, trousers, slacks, shorts, skirts, jumpers, skorts, culottes, and socks; active and gym wear, namely sweatshirts, sweatpants, shorts, t-shirts and socks. FIRST USE: 20030501. FIRST USE IN COMMERCE: 20030501.

IC 040. US 100 103 106. G & S: Custom manufacture of school and career uniforms featuring embroidery, specialty stitching and custom imprinting of clothing with decorative design. FIRST USE: 20030501. FIRST USE IN COMMERCE: 20030501

Standard Characters Claimed**Mark Drawing Code** (4) STANDARD CHARACTER MARK**Serial Number** 78891381**Filing Date** May 24, 2006**Current Filing Basis** 1A**Original Filing Basis** 1A**Published for Opposition** July 31, 2007

Registration Number 3312235
Registration Date October 16, 2007
Owner (REGISTRANT) School Apparel, Inc. CORPORATION CALIFORNIA 1099 Sneath Lane San Bruno CALIFORNIA 94066
Attorney of Record Margaret C. McHugh
Type of Mark TRADEMARK. SERVICE MARK
Register PRINCIPAL
Live/Dead Indicator LIVE

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Who Care

Word Mark	HEALTHY-WEAR FOR PEOPLE WHO CARE
Goods and Services	IC 035. US 100 101 102. G & S: Retail clothing boutiques. FIRST USE: 20040501. FIRST USE IN COMMERCE: 20041002
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	78863721
Filing Date	April 18, 2006
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	November 28, 2006
Registration Number	3208773
Registration Date	February 13, 2007
Owner	(REGISTRANT) It's Our Nature, Inc. CORPORATION FLORIDA 929 Bay Esplanade Clearwater FLORIDA 33767
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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Word Mark	CARE WEAR
Goods and Services	IC 025. US 022 039. G & S: Short-sleeved or long-sleeved t-shirts. FIRST USE: 20051206. FIRST USE IN COMMERCE: 20061206
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	01.01.13 - Stars - multiple stars with five points 07.09.08 - Statue of Liberty 26.01.08 - Circles having letters or numerals as a border; Circles having punctuation as a border; Letters, numerals or punctuation forming or bordering the perimeter of a circle
Trademark Search Facility Classification Code	ART-07.09 Monuments, stadiums and fountains HUM-STATUARY Form of Human Statues SHAPES-ASTRO Astronomical shapes consisting of celestial bodies, globes and geographical maps SHAPES-GEOMETRIC Geometric figures and solids including squares, rectangles, quadrilaterals and polygons
Serial Number	77443015
Filing Date	April 8, 2008
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	September 30, 2008

Registration Number 3546337
Registration Date December 16, 2008
Owner (REGISTRANT) PizazzcrewLLC LIMITED LIABILITY COMPANY PENNSYLVANIA 500 W. Walnut Street Perkasi PENNSYLVANIA 18944
Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "WEAR" APART FROM THE MARK AS SHOWN
Description of Mark Color is not claimed as a feature of the mark. The mark consists of the wording "CARE WEAR," with "CARE" arched downward and "WEAR" arched upward into a circle shape, with a picture of the Statue of Liberty's head and torch in center. The Statue is encircled by four small stars on top, six small stars on the bottom, and one larger star to the right.
Type of Mark TRADEMARK
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WEAR AND CARE

Word Mark	WEAR AND CARE
Goods and Services	IC 025, US 022 039, G & S: Golf shirts; Hooded sweat shirts; Long-sleeved shirts; Polo shirts; Shirts; Short-sleeved or long-sleeved t-shirts; Short-sleeved shirts; Sweat shirts; T-shirts; Tee shirts; Jackets; Jogging pants; Pants; Sweat pants; Baseball caps; Cap visors; Caps; Caps with visors. FIRST USE: 20090112. FIRST USE IN COMMERCE: 20090222
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	77427427
Filing Date	March 20, 2008
Current Filing Basis	1A
Original Filing Basis	1B
Published for Opposition	August 5, 2008
Registration Number	3613555
Registration Date	April 28, 2009

Owner (REGISTRANT) Hudson, Kathleen Mary INDIVIDUAL UNITED STATES 80 Moseley Avenue
Newburyport MASSACHUSETTS 01950

Type of Mark TRADEMARK

Register PRINCIPAL

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Typed Drawing

Word Mark KAREWEAR
Goods and Services IC 009. US 021 023 026 036 038. G & S: Protective Clothing. FIRST USE: 20010915.
FIRST USE IN COMMERCE: 20010915
Mark Drawing Code (1) TYPED DRAWING
Serial Number 76352430
Filing Date December 26, 2001
Current Filing Basis 1A
Original Filing Basis 1A
Published for Opposition September 3, 2002
Registration Number 2654184
Registration Date November 26, 2002
Owner (REGISTRANT) Gaskets, Inc. CORPORATION WISCONSIN 301 W. HWY 16 Rio WISCONSIN 539600398
Attorney of Record Christopher J. Anderson
Type of Mark TRADEMARK
Register PRINCIPAL
Affidavit Text SECT 8 (6-YR).
Live/Dead Indicator LIVE

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